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ENCOURAGING INDUSTRY IN ORDER TO PRESERVE NON-COMMERCIAL PROPERTY

KATHERINE X. VASILIADES†

I. INTRODUCTION

At one time, American cities represented opportunity and grandeur, offering great expectations and a high standard of living. With the growth of industrialization and the declining likelihood of success in rural agricultural America, people migrated to cities for jobs and prosperity. However, advancements in science and technology led to rapid industrialization which produced harmful effects upon society, the environment and human health.¹ After much debate and controversy, federal² and state³ legislatures enacted environmental statutes in an effort to combat these harmful effects.

Initially, the debate concerning environmental legislation could be characterized as a partisan political battle between environmental conservation and economic development. More recently, proponents of these two positions have adopted a more synergistic view of environmental and economic concerns.⁴ Nonetheless, despite efforts to work together, the current statutory

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1. Discovery of the ill effects of environmental contamination upon human health and welfare influenced the drafting of environmental regulations, as indicated in the National Environmental Policy Act. See National Environmental Policy Act § 101, 42 U.S.C. § 4331 (1994).

2. See, e.g., Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA]; Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-92k (1994)) [hereinafter RCRA].

3. See, e.g., N.J. STAT. ANN. § 13:1K (West 1991); OHIO REV. CODE ANN. § 3746 (Anderson 1997); PA. STAT. ANN. tit. 35, § 6020 (West 1993).

4. See *Superfund: House Leaders Support Bipartisan Effort on Brownfields, Other CERCLA Reform Issues*, 26 Env't Rep. (BNA) 2036 (Feb. 23, 1996).

scheme is in desperate need of reexamination.⁵ It is clear that a resolution requires the prevention of both economic stagnation and widespread contamination of the environment.

Federal environmental statutes, particularly the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), impose comprehensive and far-reaching liability for the contamination of land and mandate remediation. In doing so, CERCLA reflects salutary goals and forces current and potential polluters to reexamine their actions. However, because of the potentially staggering costs of remediation, critics claim that CERCLA inhibits potential purchasers and lenders from investing in property previously used for industrial purposes.⁶

Consequently, industry is migrating from the prior bulwark of prosperity to undeveloped land in suburban and rural areas, leaving behind wastelands of contaminated property and unemployment.⁷ Recognizing the needs to encourage environmental consciousness, preserve biodiversity and foster economic growth, state and federal legislatures have proposed legislation to revitalize cities and discourage the destruction of uncontaminated land.

This Article examines CERCLA's current liability scheme, which has resulted in the abandonment of contaminated industrial property (brownfields) for relatively pristine rural and suburban property (greenfields), and the responses of the United States Environmental Protection Agency (EPA) and state governments. Sec-

5. See *Superfund: Meetings Continue on GOP Reform Bill; Little Progress Seen on Disputed Issues*, 26 Env't Rep. (BNA) 2069 (Mar. 1, 1996).

6. See Debra L. Baker & Lance L. Shea, *How to Avoid Environmental Liability in Business Transactions*, 43 Sw. L.J. 957 (1990) (admonishing businesses to be prudent in transactions due to enormous liability attendant to acquisition of real estate in corporate mergers); see also *International Clinical Lab., Inc. v. Stevens*, 710 F. Supp. 466, 469 (E.D.N.Y. 1989) (stating that sellers who insert "as is" clauses which purport to absolve them from future environmental liability are not necessarily protected from CERCLA claims).

7. See Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705, 717 (1994) (stressing that urban redevelopment advocates lobby for fewer environmental impediments to reuse of formerly industrial urban property). Urban redevelopment advocates run the gamut from state officials to economic development experts who are entrusted with the economic rebirth of urban areas. More lawyers and business leaders have become a part of this group in order to alleviate their frustration with the inefficiency and cost of environmental cleanup at abandoned industrial sites. As a result, urban redevelopment advocates have experienced few problems in persuading state legislators to favor clearing the way for urban revitalization. See, e.g., Patrick von Keyserling, *Legislation Encourages Redevelopment of Industrial Land*, CENT. PA. BUS. J., Oct. 20, 1993, at 6 (stating that both Industrial Land Reuse Act and Economic Development Agency Environmental Liability Protection Act passed unanimously through Pennsylvania Legislature).

tion II of this Article discusses CERCLA, a far-reaching statute which was designed to remedy threats to human health and the destruction of resources resulting from unfettered environmental contamination. Section III addresses the problematic effects of CERCLA. This section also discusses the influence of political agendas on CERCLA reform and illustrates that CERCLA must be modified in order to be effective. Section IV discusses the impact of lender liability on the development of brownfields. Section V examines federal and state lawmakers' recognition of the desperate condition of CERCLA as well as the urgent need to revive previously used commercial property. Finally, Section VI summarizes the brownfields dilemma and offers recommendations for reform.

II. AN OVERVIEW OF CERCLA

Enacted in 1980 shortly after the Love Canal disaster, and on the eve of a new republican Senate and the close of the Carter administration,⁸ CERCLA⁹ is the primary federal statute regulating the brownfields/greenfields problem.¹⁰ CERCLA, however, is a "hastily patched together promise Act" which contains ambiguous standards and provides a fertile field for litigation.¹¹

8. See Michael Parrish, *Occidental Agrees to Pay \$98 Million in Love Canal Case Environment: In a Key Civil Lawsuit over Buried Toxic Waste, the Company Will Also Take over the Clean-up Effort*, L.A. TIMES, June 22, 1994, at 1. Love Canal was a residential community in Niagara Falls, New York. As a result of the discovery of toxic substances seeping into homes, the entire town was evacuated in 1978. See *id.*

9. See CERCLA §§ 101-405, 42 U.S.C. §§ 9601-75 (1994).

10. Two alternative liability schemes were presented to Congress. One was presented to the House of Representatives and one to the Senate. The House bill imposed liability on parties who "caused or contributed" to hazardous waste problems. Conversely, liability under the Senate bill attached to specific "responsible parties." See John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1493-94 (1994). The version of CERCLA passed was the bill sponsored by the Senate and it constituted a last minute compromise.

11. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986). In *Maryland Bank*, the United States brought an action against Maryland Bank (the bank) to recover expenses sustained by the Environmental Protection Agency (EPA) for the removal of hazardous waste at a toxic dump site owned by the bank. See *id.* The issue concerned whether the bank was liable for these expenses when the hazardous waste was dumped on the property prior to the bank's ownership of it. See *id.* at 574. Thus, the court focused its inquiry on whether the bank was an "owner and operator" of the property within the meaning of sections 107(a)(1) and 101(20)(A) of CERCLA. See *id.* at 577. The bank argued an affirmative defense based upon section 107(b)(3), asserting that the hazardous waste was the result of a third party other than the defendant. See *id.*

The court found that the bank was an undisputed owner of the property since 1982, before the waste was discovered. See *id.* The court also found the parties' dispute over the term "operator" was not determinative, since current ownership of a facility alone brings a party within the ambit of subsection (1). See *id.* Thus, the court concluded that CERCLA imposes strict liability on the present owner of a

Unlike the Resource Conservation and Recovery Act (RCRA),¹² a regulatory statute passed in 1976, CERCLA is primarily a remedial statute which responds to a "release or substantial threat of release" of harmful substances,¹³ and finances cleanup through a

facility from which there is a release or a threat of release, notwithstanding an absence of causation. *See id.* at 578.

The court ordered a full trial to resolve the issue of the bank's third party defense since genuine issues of fact remained after the court scrutinized the evidence concerning the propriety of the contractual relation between the bank and the property's former owner and the reasonableness of the bank's conduct. *See id.* at 581. In the end, the court granted the United States' motion for summary judgment pertaining to the issue of liability under section 107(a)(1) and denied that part of the motion concerning the third party defense under section 107(b)(3). *See id.*

12. *See* RCRA § 1004, 42 U.S.C. § 6903. Section 1004 of RCRA provides the definitional section. *See id.* It states in pertinent part:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

....

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may —

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or

(B) pose a substantial present or potential hazard to human health or the environment when properly treated, stored, transported, or disposed of, or otherwise managed.

Id.

13. CERCLA § 107(a), 42 U.S.C. § 9607(a)(4). Section 107 of CERCLA provides in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defense set forth in subsection (b) of this section—

....

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

trust fund called the "Superfund."¹⁴ Under CERCLA, EPA may either issue an order compelling the cleanup of a site or utilize the Superfund to clean up a site¹⁵ and seek recovery from potentially responsible parties (PRPs).¹⁶ CERCLA aims to protect human

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

14. See *id.* § 111(a), 42 U.S.C. § 9611(a). Section 111(a) of CERCLA provides in relevant part:

For the purposes specified in this section there is authorized to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26 not more than \$8,500,000,000 for the 5-year period beginning on October 17, 1986, and not more than \$5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994, and such sums shall remain available until expended. The preceding sentence constitutes a specific authorization for the funds appropriated under title II of Public Law 99-160 (relating to payment to the Hazardous Substances Trust Fund). The President shall use the money in the fund for the following purposes:

(1) Payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act [33 U.S.C. 1471 et seq.].

(2) Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however*, That such costs must be approved under said plan and certified by the responsible Federal official.

Id.

15. See *id.* § 111(b)(1), 42 U.S.C. § 9611(b)(1). Section 111(b) of CERCLA provides:

Claims asserted and compensable but unsatisfied under provisions of section 1321 of title 33, which are modified by section 304 of this Act may be asserted against the Fund under this subchapter; and other claims resulting from a release or threat of release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this subchapter for injury to, or destruction or loss of, natural resources, including cost for damage assessment: *Provided, however*, That any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any State for natural resources within the boundary of That State belonged to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation.

Id.

16. See *id.* § 106(b), 42 U.S.C. § 9606(b). Section 106(b) of CERCLA provides in pertinent part:

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for

health and welfare by preventing contamination and by removing and remediating pollution which has already occurred.¹⁷

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) to address statutory ambiguities which had become apparent shortly after the enactment of CERCLA.¹⁸ SARA provides standards, known as Applicable or Relevant and Appropriate Requirements, designed to clarify the required level of cleanup under CERCLA.¹⁹ The standards, however, have merely added to the complex web of environmental regulation.

The ambiguities of CERCLA's statutory language have resulted in extensive judicial interpretation concerning the scope and apportionment of liability.²⁰ In fact, CERCLA's "liability standard"

each day in which such violation occurs or such failure to comply continues.

(2) (A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

Id.

17. See *id.* §§ 104-06, 42 U.S.C. §§ 9604-06. Although CERCLA is not characteristically a regulatory statute, it prevents contamination through its remediation charges and scope of liability.

18. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-75 (1994)).

19. See CERCLA § 121(d)(1), 42 U.S.C. § 9621(d)(1). This section provides in pertinent part:

Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

Id.

20. See Daniel Michel, *The CERCLA Paradox and Ohio's Response to the Brownfield Problem: Senate Bill 221*, 26 U. TOLEDO L. REV. 435, 439 (1995) (concluding that Ohio has taken necessary legislative step towards ameliorating brownfield problem). Shortly after Ohio enacted legislation to respond to the ambiguities of CERCLA, Ohio Governor George Voinovich traveled to various abandoned industrial sites throughout the state in an effort to improve the bill's future impact on the brownfields problem. See E.B. Boyd, *Montgomery Lauds Brownfields Bill's Passage But Admits Error*, TOLEDO BLADE, June 30, 1994, at 19. However, less than eight months later when the City of Toledo offered one of the sites to the State of Ohio as a potential prison site, Governor Voinovich responded, "[i]f [the abandoned site experiences] big [environmental] problems, let me tell you straight out: They had

has been derived through interpretation by the federal courts. Specifically, although it does not expressly provide a measure of liability, federal courts have interpreted CERCLA as including a strict liability standard.²¹

Pursuant to CERCLA, liability is imposed upon four categories of PRPs: (1) current owners and operators; (2) past owners and operators; (3) generators (those who arranged for disposal)²²; and (4) transporters.²³ The inclusion of prior owners as PRPs is especially controversial because it results in retroactive liability for previously acceptable behavior.²⁴ Moreover, holding current owners responsible allows liability to result not because of past action, but simply due to one's status.²⁵ As a result, the disincentive to purchase property previously used for industrial purposes is clear.²⁶ Another disincentive is the possibility that lenders fear liability derived from a mortgage or security interest because the term "current owner" is not specifically defined in CERCLA.²⁷ Although

better find another site in the community." David Jacobs & Robin Erb, *Is Prison Plan Poisoned? Get East Toledo Site Tested, Voinovich Warns*, TOLEDO BLADE, Feb. 2, 1995, at 1.

21. See Michel, *supra* note 20, at 440.

22. Compare *Nurad v. Hooper*, 966 F.2d 837, 844-847 (4th Cir. 1992) (determining that "disposal" is satisfied by natural movement) with *United States v. CDMG Realty Co.*, 875 F. Supp. 1077, 1083 (D.N.J. 1995) (finding that "disposal" must be limited to its active meaning) and *United States v. Peterson Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 (D. Ill. 1992) (concluding that "passive" disposal does not trigger liability).

23. See CERCLA § 107, 42 U.S.C. § 9607. This section provides in pertinent part that the following are held liable under CERCLA:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances

Id.

24. See *id.* In 1989, the Fourth Circuit rejected the argument that retroactive liability violated the due process clause, finding that the defendant had not shown arbitrary or irrational action by Congress. See *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988).

25. Causation was a consideration in the bill proposed by the House, but not in the Senate bill, which was ultimately adopted. See Nagle, *supra* note 10, at 1493-94.

26. See CERCLA § 107, 42 U.S.C. § 9607.

27. See Sara A. Goldberg, *Lender Liability Under CERCLA: Shaping a New Legal Rule*, 4 N.Y.U. ENVTL. L.J. 61, 62-64 (1995) (asserting that new rule for lender liability should focus on benefits of lender-borrower relationship).

Congress attempted to address lenders' fears by including a "security interest exemption" in CERCLA, this exemption has produced inconsistent results in federal courts.²⁸

The apportionment of liability under CERCLA is also ambiguous. Federal courts, when faced with this issue, have generally applied common law principles.²⁹ In doing so, courts have held parties jointly and severally liable.³⁰ The imposition of joint and several liability arguably accomplishes the goals of deterrence, compensation and accountability. On the other hand, the enormous costs of remediation and removal, and the uncertain cleanup standard have deterred potential purchasers from considering urban sites previously used for industrial purposes. Purchasers have generally not been willing to enter into a transaction in which they are confronted with potential liability, obligated to absolve themselves to the greatest extent possible, and faced with the problem of trying to secure indemnification or contribution from other PRPs.

28. *See id.* at 65. One commentator argued that CERCLA expressly makes apparent that mortgagees are immune from pre-foreclosure liability under CERCLA's secured creditor exemption. *See id.* For instance, Congress's definition of "owner or operator" clearly excludes "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." *Id.*

However, several judicial decisions have addressed the possibility that banks with security interests in realty may be held responsible for cleanup costs. *See id.* Further, cases have also indicated that banks which foreclose on collateral may also be held liable. *See id.* "[T]his uncertain status in the law has had significant negative effects on the availability of credit, the environment, and the economy as a whole." *Id.*

29. *See United States v. Chem-Dyne*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). In *Chem-Dyne*, the federal government instituted an action against several companies to recover expenses for the cleanup of hazardous waste generated by the companies at a treatment facility. *See id.* Since this was an issue of first impression for the court, it focused on the basis and content of the rule which it formulated to address this question. *See id.*

The court first noted that the scope of liability under section 107 of CERCLA is to be determined by evolving principles of federal common law. *See id.* at 808. The court next determined that "an examination of the common law reveals that when two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." *Id.* at 810.

30. *See* RESTATEMENT (SECOND) OF TORTS § 433 (1965). The current standard of liability is enunciated in the Restatement (Second) of Torts sections 433A and 433B, which provide that each party is responsible for a pro rata share of divisible harm, but is subject to complete liability for single and indivisible harm. *See id.* Prior to the adoption of this standard, apportionment of liability was accomplished consistent with the standard in *Summers v. Tice*. *See generally* 199 P.2d 1 (Cal. 1948). Under the court's holding in *Summers*, when a plaintiff sustained damage due to the negligence of more than one defendant but was unable to apportion liability, each defendant had the burden of producing evidence to negate liability; otherwise, the defendant was held liable for the entire harm. *See id.*

CERCLA contains a response system that permits government and private parties to recover cleanup costs. Under section 104 of CERCLA, the government may clean up the site using Superfund resources and seek to recover costs incurred if the expenses are "not inconsistent with the National Contingency Plan (NCP)."³¹ EPA is also authorized to issue an order to PRPs compelling the cleanup of the site.³² Failure to comply with the order may result in penalties of up to \$25,000.00 per day and the imposition of treble damages.³³

Under CERCLA, private parties may seek cost recovery or contribution. If cleanup is shown to be consistent with the NCP, a party originally compelled to perform a cleanup may recover all or part of the cost from other PRPs.³⁴ In contrast, EPA may recover unless action is shown to be inconsistent with the NCP. Thus, when private parties seek contribution, they have an affirmative burden to show compliance with the NCP. In addition, a PRP may also seek contribution for cleanup costs incurred pursuant to section 107 (recovery of costs by EPA) or section 106 (order compelling cleanup).³⁵ Recoverable damages include not only pecuniary ex-

31. See CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). The National Contingency Plan (NCP) is a set of procedures for the ranking of sites by level of contamination and urgency, specifying the steps to be taken for cleanup. See *id.*

32. See *id.* § 106(b), 42 U.S.C. § 9606(b). For the relevant language of this section, see *supra* note 16.

33. See *id.* § 107(c)(3), 42 U.S.C. § 9607(c)(3). This section states:

If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President, pursuant to section 9604 or 9606 of this title, such person may be held liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

Id.

34. See *id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). For the relevant language of this section, see *supra* note 13.

35. See *id.* § 113(f)(1), 42 U.S.C. § 9613(f)(1). This section provides in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right

penses, but also expenses and natural resource damages caused by the release.³⁶

CERCLA provides few defenses to this broad-based scheme of liability. Under section 107(b)(1) & (2), a party is absolved of liability if a release is caused by an act of God or an act of war.³⁷ Additionally, pursuant to section 107(j), releases permitted under other federal environmental statutes do not result in liability under CERCLA.³⁸ More difficult issues arise in the context of the third party defense, the innocent landowner defense and indemnification agreements.

The third party defense, under section 107(b)(3), does not apply if a direct or indirect contractual relationship exists between the PRP and the third party. Moreover, the third party defense requires that the PRP establish that he exercised due care with respect to the hazardous substances and that he took precautions against foreseeable acts or omissions of any third party and the consequences that could result from such acts or omissions.³⁹ The in-

of any person to bring an action for contribution in the absence of a civil action under 9606 of this title or section 9607 of this title.

Id.

36. See CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C). Natural resource damages, recoverable by federal, state or tribal governments, include the loss of wildlife and other types of natural resources which sustained damages as a result of the release. See *id.*

37. See *id.* § 107(b), 42 U.S.C. § 9607(b). This section provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war

Id.

38. See *id.* § 107(j), 42 U.S.C. § 9607(j). This section states:

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provisions of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of title 33.

Id.

39. See *id.* § 107(b)(3), 42 U.S.C. § 9607(b)(3). This section states:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evi-

nocent landowner defense provided in section 101(35)(A) is only applicable if the landowner can demonstrate lack of actual or constructive knowledge of the existence of hazardous substances after undertaking "appropriate inquiry" upon purchasing the property.⁴⁰ Indemnification agreements are possibly the most effective tools currently available to purchasers of property. Although section 107(e) prohibits avoidance of liability through contract, courts have interpreted this section to permit indemnification agreements.⁴¹

Unfortunately, it appears that CERCLA is unable to fulfill its goals of promoting human health and welfare and responding to the destruction of valuable resources as effectively as it could. Notwithstanding the significant and laudable goals it was contemplated to achieve, this hurriedly drafted statute is in desperate need of reform. Its expansive reach and costly application, designed to wage full-scale war against environmental contamination, now serves as an obstacle to its goals. The ambiguity in construction and

dence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual relationship arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions

Id.

40. *See id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B). This section states in pertinent part:

To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

41. *See* Lisl E. Miller, *Indemnification Agreements Under CERCLA*, 23 ENVTL. L. 333, 334 (1993) (concluding that majority view upholding and enforcing indemnification clauses in cases involving liability under CERCLA should continue in light of ambiguous legislative history).

application, the indeterminate standards of cleanup, along with the breadth of liability, limits CERCLA's effectiveness. As it now stands, CERCLA may inhibit remediation of contaminated sites, thus exacerbating the current status of environmental contamination and prompting industry to encroach upon land which has not been previously put to industrial use.

III. CERCLA'S IMPLICATIONS ON BROWNFIELDS

Many American cities are facing a threat to their viability and vitality as a result of CERCLA's liability net. Fearful of triggering liability as current owners and faced with the prospect of attempting to secure financing from reluctant lenders, developers and industrial companies are opting for previously vacant land in suburban or rural areas.⁴² The result is not only the contamination of new sites, but the loss of jobs and revenue at previously used industrial sites.⁴³ In addition, precious suburban and rural land is falling prey to the development of industry and infrastructure.

Generally, the roadways, public transportation network and public utility scheme in previously undeveloped areas, or "greenfields," must be redesigned because they were initially built to accommodate a more moderate use.⁴⁴ Although this redesign causes a strain on the budget of suburban or rural municipalities, it is a more calculable expense than the potentially enormous and indefinite cost of remediation under CERCLA's liability scheme. The abandonment of industrial sites leaves behind vacant and contaminated wastelands and fosters a commuter work force, which increases air pollution.

In place of the once vital areas lie "brownfields," contaminated property which serves as a reminder of potential disease and evidence of environmental contamination and demarcation of a less

42. See Goldberg, *supra* note 27, at 72-73. Fear of lender liability has a restrictive effect on real estate transactions in areas designated as Superfund sites. See *id.* For instance, a neighborhood located in Tucson, Arizona developed lending problems attendant to its labeling as a Superfund site. Specifically residential, commercial and industrial borrowers were unable to secure loans. See *id.*

43. See *id.* Moreover, the credit crunch has also proved deleterious to the environment. See *id.* Liability concerns have deterred investment in previously used, contaminated industrial sites called "brownfields." See *id.* Reluctance by banks to become involved with properties with potential liability impedes ability to restore such areas. See *id.*

44. See McWilliams, *supra* note 7, at 720. Government regulations do not require industries to assume any pre-development responsibility for the potential contamination of greenfields. See *id.* As a result, federal, state and local taxpayers assist the environmentally suspect spread of industrial development to greenfields sites. See *id.*

desirable place to live.⁴⁵ Clearly, an area already proven or suspected of being infected with toxins will not be attractive to potential residents, leaving those with lower income to bear a large share of environmental risk.⁴⁶ Reduction in property values may serve as an added disincentive to undertake costly remediation of urban sites.⁴⁷

Development of new commercial areas in cities is not the only type of construction inhibited by the current liability scheme. Modernization and redevelopment of current commercial facilities are also hindered by the potentially enormous costs of cleanup and the reluctance of lenders to finance such ventures. Moreover, the redevelopment or expansion of an existing commercial site presents a greater risk of liability than financing the development of previously non-commercial property. The risk of previously non-commercial sites is limited to the investment made, while existing commercial sites are subject to CERCLA's indeterminate environmental liability.⁴⁸ Assuming CERCLA's strict liability is imposed, expensive cleanup costs may compromise the borrower's ability to pay off debt, leaving the lender with the option to foreclose upon a contaminated piece of property.⁴⁹ Therefore, lenders may view ex-

45. See *id.* at 712. Few urban communities have the resources to follow their own redevelopment plans without soliciting sources from public and private sources employed by industrial redevelopment advocates. See *id.* Consequently, communities which strongly emphasize economic development will likely benefit from outside resources provided by redevelopment advocates. See *id.*

46. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 801 (1995). Advocates of environmental justice have asserted that brownfield sites are deliberately placed in low income communities, adding to the discrimination present in such areas. See *id.* In addition, differential cleanup standards, which may promote investment, may be characterized as an aggravating factor. See *id.*

47. See *id.* Flexibility in determining appropriate levels of cleanup generally precipitate sensitive environmental equity issues. See *id.* Further, the strong concern for environmental equity "is the wild card in any effort to cut the cost of remediating contaminated land — either by tailoring the scope of the cleanup to a specific use, or by . . . restrictive use covenants . . ." *Id.*

48. See Goldberg, *supra* note 27, at 63. In routine lending transactions, financial institutions typically incur substantial risks. Generally, however, in the absence of Superfund liability, the most a lender stands to lose is the amount of the investment. For example, a financial institution that secures a loan with real estate accepts both the risk of a reduction in the value of the collateral due to environmental problems and the risk that the borrower will be unable to pay for necessary cleanup. Consequently, these risks diminish the value of the bank's investment and increase the risk that its lien will be subordinated to a superior lien imposed by the government.

49. See Hank Schilling, *Clarity, Predictability and Simplicity*, 12 ENVTL. FORUM (Envtl. L. Inst.) No. 3, at 28 (May-June 1995).

isting commercial sites as providing inadequate collateral due to the threat of environmental liability.

The brownfields dilemma also illustrates the often differing agendas of environmentalists and developers and creates a political minefield of potentially explosive issues. Developers seek opportunities for capital gain. While environmental advocates seek assessment and remediation of property, developers are inhibited by ambiguous and often conflicting state and federal environmental statutes.⁵⁰ In short, developers desire flexibility in the costs and standards of removal and remediation, and regulatory predictability.⁵¹ These two factors, however, are unlikely to coexist without tension.

Standing in opposition to those advancing the interests of industrial and economic development are those whose primary concern is environmental conservation and remediation. These two opposing interests meet in the political arena, and each hopes to affect statutory liability. Specifically, republicans traditionally promote the advancement of industry, favoring fewer or more lenient government imposed environmental regulations. In contrast, democrats advocate a more strict and more pervasive governmental regulatory scheme.

Today, neither interest group is content, and each fiercely fights against the other to advance its goals. This unrelenting tug of war can only yield a Pyrrhic victory, leaving the environment and society as its casualties. Fewer or less stringent standards may facilitate industrial advancement, but will not aid the remediation of contaminated property. Moreover, this type of regulatory scheme adds to the problems of discrimination, disease and decreased property values. Conversely, stringent and pervasive regulations compel developers to develop previously non-industrial sites. This results in expansion of environmental contamination, loss of species upon which biodiversity depends, loss of revenue and employment opportunity, and decline in property values.

It is clear that statutory reform is imperative. Compromises should not be perceived as political suicide or a sacrifice of ideals. Instead, compromise should be viewed as necessary to a political solution. The task to be completed is imposing, but a regulatory

50. See John C. Wise, *Brownfields: Recycling Contaminated Urban Land*, LAND USE AND ENVTL. FORUM, Summer 1995, at 141.

51. See *id.* at 142. Developers and lenders consider regulatory requirements and the remediation process in making determinations regarding risks of potential investments. See *id.* Ambiguity creates difficulties in assessing risks, and diminishes the certainty and predictability of remedial costs and regulatory standards. See *id.*

scheme must be structured in such a way as to encourage developers to consider purchasing abandoned sites and lenders to finance such development. However, the regulatory scheme must concurrently provide for remediation of contaminated property in order to avoid creating an enormous wasteland that threatens human health and welfare. Moreover, this reform must occur simultaneously on the state and federal level with regulations operating in tandem.

IV. ACQUIRING LIABILITY

The potential liability of lenders and developers under CERCLA as current owners or operators of property presents a large stumbling block for the redevelopment of brownfields.⁵² The fear of the risk of strict, joint and several liability is a major consideration contemplated by lenders prior to financing redevelopment.⁵³ Not only may lenders be held liable as current owners, but cleanup costs may threaten the financial stability of a borrower. This presents the possible result of a borrower's insolvency, leaving the lender with devalued collateral.⁵⁴ The issue of lender liability under CERCLA as interpreted by federal courts is one of the significant issues addressed by legislators attempting to resolve the brownfields/greenfields problem.

Several vague and controversial aspects of CERCLA have been interpreted by federal courts. For example, CERCLA does not specify the standard of liability to be imposed upon PRPs. Judicial interpretation, however, has resulted in the imposition of strict liability.⁵⁵ Despite the lack of express articulation of such a standard,

52. See William Keener, *Brownfields: The United States EPA's Policy and Legal Response*, LAND USE AND ENVTL. FORUM, Summer 1995, at 143.

53. See Goldberg, *supra* note 27, at 63, 69-71. Financial institutions now risk liability greater than their investment in light of CERCLA's "wide net of liability." *Id.* at 63. Further, if the mortgaged property is contaminated, the lender's security interest is jeopardized, and the lender may be held responsible for both cleanup costs and natural resource damages. See *id.*

54. See McWilliams, *supra* note 7, at 728-29; see also Goldberg, *supra* note 27, at 62-65. The risks in routine lending transactions are essentially limited to the amount of institution's investment, while transactions involving contaminated property present additional risks, such as reduction in value and threat to the financial stability of the borrower. See Goldberg, *supra* note 27, at 63.

55. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). In *Shore Realty Corp.*, the State of New York brought an action against Shore Realty Corporation and Donald LeoGrande, its officer and stockholder, in the United States District Court for the Eastern District of New York, seeking an order for Shore Realty to clean up a hazardous waste disposal site, which it owned. See *id.* at 1037. The district court ordered Shore Realty and LeoGrande to remove the haz-

courts derived the standard of strict liability from the legislative history of CERCLA.⁵⁶

CERCLA also lacks any explicit instruction as to apportionment of liability. When faced with this issue in *United States v. Chem-Dyne*, the United States District Court for the Southern District of Ohio determined that, consistent with legislative intent, common law principles would control.⁵⁷ As a result, the court adopted the joint and several apportionment position articulated in the Restatement (Second) of Torts sections 433A and 433B.⁵⁸ Specifically, the Restatement requires that independent actors causing a single harm bear a pro rata share of the liability when the harm is divisible.⁵⁹ However, in the case of indivisible harm, each individual ac-

arduous waste stored on the property and held them liable for costs under section 107(a)(4)(A) of CERCLA. *See id.*

The United States Court of Appeals for the Second Circuit affirmed the lower court's holding. *See id.* Specifically, the Second Circuit held that Shore Realty was liable as an owner of property and that LeoGrande was liable as an operator under CERCLA. *See id.* at 1049-53.

56. *See id.* at 1042 (stressing that Congress intended responsible parties be held strictly liable, notwithstanding absence of explicit provision included in statute). The Second Circuit noted that section 101(32) of CERCLA states that liability under CERCLA shall be consistent with the standard of liability applied under the Clean Air Act, which courts have held to be strict liability. *See id.* Further, the court interpreted section 107 as providing strict liability. *See id.* The court noted, however, that strict liability under CERCLA is not absolute; there are defenses under 107(b) which absolve a party from liability under CERCLA. *See id.*

57. *See United States v. Chem-Dyne*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). The court analyzed the effect on CERCLA's scope of liability of Congress's deletion from the statute of the term "joint and several liability." *Id.* The court concluded, however, that the deletion did not represent a rejection of joint and several liability. *See id.* Instead, the court reasoned that the term was deleted in order to permit the scope of liability to be determined according to common law principles. *See id.* Thus, the court held that courts may perform "a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites . . . [and] assess the propriety of applying joint and several liability on an individualized basis." *Id.*

58. *See id.* at 810. The court concluded that an absolute adoption of the joint and several liability standard would be inconsistent with CERCLA's legislative history. *See id.*

59. *See* RESTATEMENT (SECOND) OF TORTS § 433A (1965). Section 433A of the Restatement (Second) of Torts provides:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

Id.

tor is subject to liability for the entire harm.⁶⁰ While a minority of courts digress from the *Chem-Dyne* decision and permit judicial discretion consistent with equitable principles, the rule enunciated in *Chem-Dyne* continues to be the majority approach.⁶¹ Clearly, the potential of liability for an entire harm poses a serious economic risk for a lender.⁶²

Ambiguity in statutory provisions has also been recognized with regard to the imposition of liability for "owners," "operators," and those who "arrange for disposal."⁶³ Although CERCLA specifically excludes from liability a person whose interest is limited to protection of a security interest,⁶⁴ mortgagees have repeatedly

60. See *id.* § 433B. This section states:

(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

Id.

61. See Suzanne S. Dickey, Note, U.S. EPA v. Sequa Corp. (*In Re Bell Petroleum Services, Inc.*): *The Fifth Circuit Limits the Imposition of Joint and Several Liability on CERCLA Defendants*, 68 TUL. L. REV. 1663, 1666 (1994) (concluding that majority of courts follow 1983 court decision in *United States v. Chem-Dyne*).

62. Potential responsibility for an entire harm is also significant in view of the determination that bankruptcy discharges CERCLA liability, unless a company continues to own contaminated property following reorganization. See Catherine M. Madore & Janie Breggin, *Environmental Liability Associated with Real Estate Transfers*, 22 COLO. LAW. 67, 68 (1993).

63. See, e.g., *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (finding that participation of Fleet Factors Corporation in final managerial activities of textile company which had declared bankruptcy was sufficient to trigger liability); *Sanford St. Local Dev. Corp. v. Textron*, 768 F. Supp. 1218 (W.D. Mich. 1991) (concluding that Textron's discounted sale of property containing hazardous substances amounted to "arranging for disposal" of substances for CERCLA liability purposes); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (holding Maryland Bank and Trust Company liable as owner based upon acquisition of title following foreclosure).

64. See CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1994). This section states:

The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title, or control of which was conveyed due to delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately be-

found themselves with potential liability exposure. In fact, a mortgagee must consider the threat of liability as an owner or operator in the context of activity prior to or following foreclosure.⁶⁵

In 1989, in *Guidice v. BFG Electroplating & Manufacturing Co.*, the United States District Court for the Western District of Pennsylvania considered a pre-foreclosure action of a bank.⁶⁶ Relying on the fact that the actions of the bank did not indicate that it had actual control of the property, the court found that the bank fell within CERCLA's security interest exemption and thus was not liable.⁶⁷ However, in 1990, in *United States v. Fleet Factors Corp.*, the security interest exemption was more strictly construed. In that case, the Eleventh Circuit held that the capacity to control, without more, may trigger liability.⁶⁸ That same year, in *Hill v. East Asiatic*

forehand. Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id.

65. See Goldberg, *supra* note 27, at 64. There are four categories of liable parties under CERCLA: (1) site owners and operators; (2) prior owners at the time of disposal; (3) generators; and (4) transporters of waste. See *id.* As a result, lenders are affected in two ways. See *id.* First, a lender may be considered an operator if it involves itself in the management of a mortgagee. See *id.* Second, a lender may become an owner by foreclosing on a mortgage. See *id.* Thus, both the pre-foreclosure and the post-foreclosure situations present a liability risk to the lender. See *id.*

66. See generally *Guidice v. BFG Electroplating & Manufacturing Co.*, 732 F. Supp. 556 (W.D. Pa. 1989). In *Guidice*, borough residents brought suit against a property owner, alleging unlawful contamination of the environment and sought to recover response costs under CERCLA. See *id.* The property owner also brought a third-party action against current and past owners of adjacent property, seeking indemnification, contribution and response costs from owners, including the mortgagee bank which held title to the adjacent property for eight months. See *id.*

The United States District Court for the Western District of Pennsylvania held that: (1) the bank's conduct before it purchased the property at a sheriff's sale did not remove it from CERCLA's security interest exception and (2) CERCLA's security interest exception did not apply during the time which the bank was the record owner of property. See *id.*

67. See Goldberg, *supra* note 27, at 66. In *Guidice*, the bank had met with the borrower to discuss the management and operations of the plant. See *id.* In addition, the bank had assisted the borrower in complying with its wastewater discharge. See *Guidice*, 732 F. Supp. at 558.

68. See *United States v. Fleet Factors Corp.*, 901 F.2d at 1557-58. In *Fleet Factors*, the United States brought an action against Fleet Factors Corporation ("Fleet") to be reimbursed for expenses used to remove hazardous waste from a bankrupt textile facility. See *id.* at 1552. The United States District Court for the Southern District of Georgia denied Fleet's motion for summary judgment because it concluded that Fleet's activities at the facility might rise to the level of participation in management sufficient to impose liability under CERCLA. See *id.*

The United States Court of Appeals for the Eleventh Circuit held that Fleet was liable under section 107(a)(2) of CERCLA for its activities. See *id.* at 1560.

Co. (*In re Bergsoe Metal Corp.*), the Ninth Circuit declined to follow the rigid approach applied in *Fleet Factors*. The Ninth Circuit held that exercise of actual participation in management is a prerequisite to the imposition of liability.⁶⁹ Despite this alternate holding, however, the strict *Fleet Factors* holding continues to influence lenders.⁷⁰ The court's refusal to apply the security interest exemption subsequent to foreclosure by lenders has also forced lenders to be cautious.⁷¹

In 1992, EPA issued a lender liability rule in an effort to clarify CERCLA liability and avoid further inconsistencies in judicial interpretation.⁷² The new rule specified that actual managerial participation, rather than mere inchoate control, was necessary for the imposition of liability.⁷³ In addition, the rule specified that parties could not be held liable under CERCLA for foreclosing on property, preserving the value of property, or holding property while entertaining reasonable offers.⁷⁴ This lender liability rule, however, was rejected in *Kelley v. EPA*.⁷⁵ In *Kelley*, the United States Court of Appeals for the District of Columbia Circuit found that EPA had

However, because there remained disputed issues of material fact, the court remanded the case for further proceedings. *See id.*

69. *See generally* *Hill v. East Asiatic Co.* (*In re Bergsoe Metal Corp.*), 910 F.2d 668 (9th Cir. 1990). In *Hill*, a Delaware corporation engaged in the business of lead recycling, Bergsoe Metals, had various hazardous substances at its plant site in St. Helens, Oregon. *See id.* at 669. The Port Authority of St. Helens ("the Port") and the United States National Bank of Oregon ("Bank") financed the St. Helens plant, which became bankrupt as a result of financial difficulties. *See id.* The issue was whether the Port was responsible for the cleanup costs under CERCLA.

The United States Court of Appeals for the Ninth Circuit held that the Port was not an "owner" liable for environmental cleanup costs under CERCLA because the Port had an "indicia of ownership primarily to protect its security interest and . . . [the Port] did not participate in the management of the Bergsoe recycling plant." *Id.* at 673.

70. *See* Goldberg, *supra* note 27, at 74. Many lenders have argued that the industry is currently in a credit crisis. *See id.* This perception is pervasive among members of both Congress and banks. *See id.* As a result of this crisis, banks have "begun to behave in a more cautious, protectionist manner." *Id.*

71. *See id.* at 83-84. In *United States v. Maryland Bank & Trust Co.*, the court held that once a bank forecloses, the bank no longer holds indicia of ownership, but instead holds full title. *See* 632 F. Supp. 573, 576-80 (D. Md. 1986). As a result, the bank no longer qualifies for the secured creditor exemption. *See id.*

72. *See* National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability under CERCLA, 40 C.F.R. § 300.1100 (1994).

73. *See id.* § 300.1100(c).

74. *See id.* § 300.1100(d).

75. 15 F.3d 1100, 1109 (D.C. Cir. 1994). In *Kelley*, the State of Michigan and a chemical manufacturers' association filed a petition for review of a final EPA regulation, which defined the scope of lender liability under CERCLA. *See id.* at 1103. The United States Court of Appeals for the District of Columbia Circuit held that the regulation should be vacated because Congress intended that the judiciary, rather than EPA, adjudicate the scope of CERCLA liability. *See id.* at 1109.

exceeded its rulemaking authority authorized by Congress.⁷⁶ In light of these decisions, it is clear that reforming CERCLA could provide greater certainty and uniformity in the area of lender activity. Greater predictability would encourage lenders to provide financing for the redevelopment of brownfields.

V. FEDERAL AND STATE RESPONSE TO THE BROWNFIELDS RECLAMATION DILEMMA

Programs encouraging the recycling and reuse of brownfields have been proposed and implemented on the state and federal levels in response to the urgent need to preserve resources and foster economic development. At the federal level, EPA has introduced the Brownfields Economic Redevelopment Initiative (BERI). Many states, however, have opted for voluntary cleanup plans. These state and federal plans, together with statutory modifications to CERCLA, could effectively reform the current Superfund program.⁷⁷

A. Agency Response and Resolution

BERI employs a six-part scheme to facilitate the redevelopment of contaminated sites.⁷⁸ First, BERI awards fifty pilot grants of up to \$200,000 each over two years, in order to encourage participation by communities, investors, lenders, and others to clean up sites. In doing so, BERI provides redevelopment models and cleanup guidelines.⁷⁹ Second, BERI provides technical assistance to state and local communities.⁸⁰ Third, BERI offers job training and development activities.⁸¹ Fourth, BERI provides technical guidance.⁸² Fifth, BERI includes a Common Sense Initiative (CSI), which brings together representatives from industry, public interest

76. *See id.* at 1108-09. The D.C. Circuit recognized the clarity provided by the EPA rule, however, it concluded that EPA's authority was limited to reconciling statutory ambiguities. *See id.* The D.C. Circuit held that only Congress has interpretive rulemaking power. *See id.* at 1108. The D.C. Circuit explained that EPA's authority is limited to bringing the question of the interpretation of a statute to a federal court as the "prosecutor." *See id.*

77. On September 29, 1995, Senator Smith described the current Superfund program as a "bewildering mix of lawyers, bureaucrats, insurers, small business owners, polluters and others trapped in a tangled web of retroactive, joint, strict and several liability," and as an example of "good intentions gone bad . . ." 141 CONG. REC. S14,711 (daily ed. Sept. 29, 1995) (statement of Sen. Smith).

78. *See Wise, supra* note 50, at 151.

79. *See id.*

80. *See id.*

81. *See id.* at 152.

82. *See id.*

groups, regulators and others, in order to combine efforts in reaching solutions.⁸³ Finally, BERI coordinates resources and defines roles of federal, state and local agencies, organizations, and businesses.⁸⁴ Senator Bond quoted author Gregg Easterbrook in describing BERI as “ecological realism at its finest, balancing the needs of nature and commerce.”⁸⁵

In addition to BERI, EPA encourages remediation of commercial property by providing refuge for prospective purchasers. Specifically, EPA may enter agreements providing a covenant not to sue purchasers for existing contamination.⁸⁶ The primary criteria considered by EPA in determining whether to enter into such agreements include: (1) current or potential EPA action at the facility; (2) benefits from cleanup; (3) whether continued operation will exacerbate the conditions at the site, interfere with EPA response, or create health risks; and (4) the financial condition of the purchaser.⁸⁷

Alternatively, EPA may provide a letter, called a “status” or “comfort” letter, setting forth the status of the site and EPA’s intentions with regard thereto.⁸⁸ This correspondence does not insulate the purchaser from further action. This correspondence does, however, offer prospective purchasers a realistic indication of the current status of the facility.⁸⁹

B. Statutory Reform

Both the Senate and the House of Representatives have been active with debate regarding a variety of bills proposing to establish programs to reclaim brownfields and regain lost vitality in urban areas.⁹⁰ In addition, EPA has articulated four goals in this regard.⁹¹

83. See Wise, *supra* note 50, at 152.

84. See *id.* at 153.

85. 141 CONG. REC. S14,367 (daily ed. Sept. 27, 1995) (statement of Sen. Bond). Senator Bond also quoted author Phillip Howard, who said “EPA’s Brownfields initiative represents an important change in direction. It will help the environment and the economy at the same time by dealing with the problem of contaminated properties in a common sense way.” *Id.* Senator Bond concluded that the initiative is a “win-win proposition for everybody. We are delighted to accept the amendment on this side.” *Id.*

86. See Keener, *supra* note 52, at 146.

87. See *id.*

88. See *id.* at 149-50.

89. See *id.*

90. See, e.g., *Reform of Superfund Act*, 26 Env’t Rep. (BNA) 1217 (Sept. 29, 1995).

91. See *Superfund Legislative Goals on ‘Brownfields’ Outlined by EPA Officials at Conference*, 26 Env’t Rep. (BNA) 1096 (Oct. 20, 1995).

First, EPA has urged Congress to adopt a uniform definition of brownfields as industrial property remaining unused due to pollution. Second, EPA has sought delineation of the relative authority of federal, state and local regulation. Third, EPA has desired the establishment of definite triggers and limits of liability. Finally, EPA has sought the effective use of Superfund financing.⁹²

In furtherance of these goals, Congress and state legislatures have proposed legislation. Generally, the proposed bills have included funding, through federal grants and interest-free loans, and protection for purchasers and lenders.⁹³ In addition, the legislatures have suggested tax incentives by means of contributions to an established brownfields Individual Retirement Account (IRA).⁹⁴ The proposed legislation from the so-called "rust belt" states has included many of these concepts.⁹⁵ However, the Clinton Administration's reactions and proposals for reform highlight the obstacles to regain use of urban property.⁹⁶

On August 3, 1995, Representative Borski of Pennsylvania, supported by representatives of the "rust belt" states, introduced a brownfields cleanup program in the House of Representatives.⁹⁷ Describing the Superfund as a "job killer" and a general hindrance to economic revitalization, Representative Borski suggested that money from the Superfund be set aside for urban redevelopment. He suggested that the funding should be in the form of grants (\$45 million total) and loans (\$90 million total). In addition, Representative Borski proposed establishing liability shields for prospective purchasers who "have no connection with the waste disposal."⁹⁸

92. *See id.*

93. *See, e.g.*, 141 CONG. REC. E1625 (daily ed. Aug. 3, 1995) (statement of Rep. Brown). Representative Brown of Ohio, supported by Representative Klink of Pennsylvania and others introduced legislation on August 4, 1995, which proposed to establish grant and loan programs and provide protection to purchasers and lenders. *See id.*

94. *See* 142 CONG. REC. H978 (daily ed. Jan. 31, 1996) (statement of Rep. Franks). On January 31, 1996, Representative Franks of New Jersey introduced a bill creating a brownfields IRA which would allow tax-free contributions of up to 15 million. *See id.*

95. *See* McWilliams, *supra* note 7, at 712 n.15 (identifying "rust belt" states as New Jersey, Pennsylvania, Ohio, Indiana, Michigan and Illinois.)

96. *See id.* at 712-13.

97. *See* 141 CONG. REC. E1623 (daily ed. Aug. 3, 1995) (statement of Rep. Borski). Representative Borski stressed that the brownfields cleanup program would increase employment opportunities in the nation's major cities which have hampered its workers with inflexible environmental laws. *See id.* Specifically, Representative Borski stated that "[t]his bill is necessary because Superfund has become an obstacle to the economic redevelopment of our cities." *Id.*

98. *Id.* Specifically, Representative Borski proposed that \$45 million be made available for grants to cities for site characterization work and \$90 million be af-

Representative Borski also commended EPA Administrator Carol Browner for delisting 25,000 sites from the Comprehensive Environmental Response, Compensation and Liability Information System list.⁹⁹

Promoting the encouragement of investment by private parties, Representative Richard Gephardt of Missouri joined Representative Borski on the floor of the House. Representative Gephardt received support from Representatives Brown and Stokes of Ohio, Representative Dingell of Michigan, Representatives Borski and Klink of Pennsylvania, Representative Rush of Illinois, Representatives Manton and Towns of New York, and Representative Furse of Oregon.¹⁰⁰ Representative Gephardt proposed a bill containing three major objectives, namely, funding, clarifying lender liability, and protecting prospective purchasers who exercise good faith.¹⁰¹ According to Representative Gephardt, funding would be achieved by interest-free loans or grants, financed by the Superfund. Moreover, the loans and grants would be awarded on the basis of relative capacity to provide employment and the amount of local support. Local support would be measured by the amount of local participation and local funding available.¹⁰² In addition, funding for envi-

forded to cities for cleanup work. *See id.* Moreover, the bill included protection for potential buyers of property who may be discouraged from purchasing land for fear of potential liability. *See id.*

99. *See id.* Representative Borski emphasized that the brownfields problem has had a major impact on communities across the country, and noted that "experts have estimated as many as 500,000 contaminated sites . . . could be available for productive industrial development if the liability issue was settled." *Id.*

100. *See* 141 CONG. REC. E1622 (daily ed. Aug. 3, 1995) (statement of Rep. Gephardt). Representative Gephardt made clear, however, that the legislation will not resolve all aspects of the problem. *See id.* at 1623. Rather, he suggested that an erasing of the problem necessitates a comprehensive reform of the Superfund bill. *See id.* Furthermore, he noted that the treatment of leaking underground storage tanks is also an important issue that must be addressed. *See id.*

101. *See id.* at E1622-23. Representative Gephardt concluded that the proposed legislation was a significant step towards "confronting the most important factors that have blocked redevelopment of communities throughout urban and rural America." *Id.*

102. *See id.* at E1622. Representative Gephardt explained the purpose of this proposed legislation as follows:

[This legislation was designed to] help provide funding that the private sector cannot always provide Local government entities, such as the St. Louis community development agency, would be able to apply and compete for interest-free loans or grants to perform site assessments and cleanup activities. The grants and loans would be competitively awarded based on their capacity to create new jobs, as well as the amount of local participation and financial support.

Id.

ronmental assessment would be provided in order to dispel some uncertainty as to potential remediation cost.¹⁰³

Regarding lender liability, Representative Gephardt also stated that the *Fleet Factors* decision obfuscated the security interest exception under CERCLA. To remedy the confusion, he proposed that the lender liability standard be clarified to exclude lenders who are not managing daily operations or contributing to contamination.¹⁰⁴ Finally, Representative Gephardt's proposed bill suggested to eliminate liability for prospective purchasers who conducted certain precautionary measures prior to purchase.¹⁰⁵

On August 4, 1995, Representative Brown of Ohio, supported by the "rust belt" states representatives, reiterated the above concerns and proposed similar legislation to address the brownfields problem.¹⁰⁶ Like Representative Gephardt's bill, Representative Brown's bill, House Bill 2178, included a federal grant program and protection for lenders and prospective purchasers. Represen-

103. *See id.* Representative Gephardt emphasized that the nation's major cities have stressed that site characterizations and assessments are very helpful in marketing contaminated sites to potential purchasers or developers. *See id.* For instance, he suggested that parties are more likely to invest in brownfield properties after determining the level of contamination because the projected cleanup costs are better known. *See id.* Thus, he proposed authorizing EPA to afford local governments over \$15 million in annual payments to perform such assessments. *See id.*

104. *See id.* at E1623. More precisely, Representative Gephardt stated: This legislation clarifies the lender liability issue in order to encourage private sector investment. The [Eleventh Circuit's decision in *United States v. Fleet Factors Corp.*] obscured the intent of Superfund's secured-lenders exemption. This confusion has made many lenders reluctant to become involved in potentially contaminated properties. Bankers now often fear that their interest may make them subject to cleanup liability for newly discovered or released contamination. The bill makes it clear that lenders who are merely performing a lending function and not managing a site's daily operations or contributing to the contamination can lend for redevelopment purposes without fear of incurring environmental liabilities.

Id.

105. *See* 141 CONG. REC. E1623 (daily ed. Aug. 3, 1995) (statement of Rep. Gephardt). Representative Gephardt also stressed that the bill provides protection for good-faith buyers of property. *See id.* For instance, the bill exempts potential purchasers from liability when they acquire property subsequently found to be contaminated if the purchaser takes certain precautionary measures. *See id.* Thus, unlike Superfund, this legislation permits a purchaser who inspects the site carefully to avoid liability if contamination is subsequently discovered. *See id.*

106. *See* 141 CONG. REC. E1625 (daily ed. Aug. 4, 1995) (statement of Rep. Brown). Representative Brown stressed that the proposed legislation addressed the problem in which land is used for industrial purposes and subsequently abandoned upon discovery of contamination. *See id.* Specifically, the bill introduced a grant program for local communities to assist them in determining the extent of the land's contamination. *See id.*

tative Brown's bill, however, also included a "revolving loan fund" to be repaid over the course of ten years.¹⁰⁷

Prior to the close of 1995, Representative Lewis of California submitted a conference report from the Department of Veterans Affairs, the Department of Housing and Urban Development, and other independent agencies regarding a proposed bill, House Bill 2099.¹⁰⁸ Two particular amendments of House Bill 2099 were relevant to the brownfields issue. Specifically, amendment 74 of House Bill 2099 aimed to prohibit funding for the listing of sites on the NPL unless the governor of the host state provided a written request to the EPA Administrator.¹⁰⁹ According to Representative Lewis, this amendment was consistent with congressional intent because Congress had intended to delegate Superfund responsibility to the states and to reduce Superfund spending.¹¹⁰ Amendment 75 of House Bill 2099 proposed to terminate funding for BERI, which was scheduled to receive funds to complete the fifty pilots by the end of the 1996 fiscal year. Instead, amendment 75 directed EPA to provide financial assistance to local communities for assessment of sites to ensure current, rather than future, levels of funding.¹¹¹

Also in 1995, Senator Smith introduced the Accelerated Cleanup and Environmental Restoration Act of 1995 as a bill to

107. *See id.* Representative Brown noted that this bill established a revolving loan fund for local governments to facilitate their funding of cleanup actions. *See id.* Representative Brown stressed the importance of fiscal responsibility in developing brownfields legislation. *See id.* Noting the economic realities recognized by Representative Brown, one commentator noted that "[n]o local, state, or regional economy gains when sites remain dormant and adjoining neighborhoods suffer." Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285 (1995).

108. *See* 141 CONG. REC. H13,249 (daily ed. Nov. 17, 1995) (statement of Rep. Lewis).

109. *See id.* at H13,268 (statement of Rep. Lewis).

110. *See id.* One commentator noted that state governments have been limited by federal law but that states have been active in this area within the limitations of federal law. *See* Solo, *supra* note 107, at 288-90.

111. *See* 141 CONG. REC. H13,268 (daily ed. Nov. 17, 1995) (statement of Rep. Lewis). Representative Lewis noted:

The conferees are in agreement as to the importance of the Brownfields programs and direct the agency to provide financial assistance to local communities [sic] to expedite the assessment of brownfields sites in order to ensure early remediation of these properties in conjunction with local economic development goals. The Brownfields initiative is to be funded at no less than the current level.

Id. Representative Lewis further recognized that while the authorizing committees are in the process of revamping the Superfund program and that "honest disagreements" exist, "there nevertheless are many things the agency can and should be doing now within the context of reform that amount to nothing more than good government." *Id.*

reauthorize and amend CERCLA.¹¹² This voluminous legislation had several significant sections. First, the bill amended section 201(b)(8) of CERCLA to provide between two and five percent of Superfund to each state which notified the EPA Administrator of its intent to establish a qualifying program.¹¹³ Second, the bill also amended CERCLA by defining a brownfield facility as land presently or previously containing abandoned or under-used commercial or industrial property, which is hindered in redevelopment or expansion by hazardous substances present or possibly present.¹¹⁴ The definition was expressly limited in the bill by excluding listed or proposed NPL sites.¹¹⁵ Third, the bill provided for interest-free loans of \$100,000 for one year and no more than \$200,000 in total, to be repaid within ten years.¹¹⁶ The loans, however, would be

112. See 141 CONG. REC. S14,716 (daily ed. Sept. 29, 1995) (statement of Sen. Smith). The bill provided that the specific amount of funding allocated to a state be calculated by multiplying the total amount of the Superfund by a fraction. See *id.* The bill further provided that the numerator of the fraction would equal the number of facilities in the particular state listed on the Comprehensive Environmental Response, Compensation and Liability Information System list, but would exclude NPL sites. The denominator would reflect the total number of like facilities nationwide. See *id.*

113. See *id.* Senator Smith noted that the Superfund program has inadequately met the demands associated with the growing brownfields problem. See *id.* at S14,711. For example, the expectation of Superfund, when enacted in 1980, was to address the cleanup of a few hundred sites each year. See *id.* However, by 1995, there were over 1,300 sites on the NPL, and 30-40 sites have been being added each year. See *id.*

114. See *id.* at S14,711.

115. See *id.* Senator Smith stressed that the bill represented an effort to respond to the broad-based concerns and problems with the Superfund Program. See *id.* More precisely, Senator Smith emphasized that "the legislation will accelerate the pace of cleanups by reducing cleanup costs, reducing litigation costs, and providing economic incentives for PRPs to stay on site and get the job done." *Id.*

116. See *id.* The general provisions for these loans stated that "[o]n approval of an application made by an eligible entity, the Administrator may make interest-free loans out of the Fund to the eligible entity to be used for the site characterization and assessment of 1 or more brownfield facilities." *Id.* Moreover, the proposed legislation also provided:

Each loan made under this section shall be subject to an agreement that—

(A) requires the eligible entity to comply with all applicable State laws (including regulations);

(B) requires that the eligible entity shall use the loan exclusively for purposes specified in paragraph (2); and

(C) contains such other terms and conditions as the Administrator determines to be necessary to protect the financial interests of the United States and to carry out the purposes of this section.

Id. at S14,717.

available for only five years following enactment of the bill.¹¹⁷ To receive a loan under the provisions of the bill, a facility and the redevelopment plan would have to be sufficiently described, including an explanation of the potential to stimulate economic development and create jobs.¹¹⁸ Fourth, the bill protected purchasers from liability provided the purchaser conducted satisfactory inquiries prior to purchase of the property and did not exacerbate the contamination. Fifth, the bill limited lender and lessor liability if the interest in the property was created by foreclosure, a security interest or extension of credit. Finally, the bill excluded landowners adjacent to NPL sites from liability if the contamination was due to a contiguous site.¹¹⁹

Early in 1996, a particularly poignant bill was introduced into the House of Representatives concerning the brownfields problem. Recognizing the financial impediment to redevelopment, Representative Coyne of Pennsylvania proposed a tax incentive contained in the Brownfields Redevelopment Act to encourage private sector remediation.¹²⁰ The tax incentive provided a fifty percent credit for payments made pursuant to an EPA approved remediation plan or a plan approved by a designated state agency. The tax incentive, however, was subject to several restrictions. Specifically, sites would have to remain fallow for one year, be unlikely to undergo development without this assistance, demonstrate a significant potential for new employment, and redevelopment would have to be capable of being concluded in a reasonably short period of time.¹²¹ In addition, the tax incentive would be available only to "innocent owners."¹²² The bill contained several other noteworthy provisions. First, the bill provided that the interest paid on qualified redevel-

117. See 141 CONG. REC. S14,716 (daily ed. Sept. 29, 1995). The bill specifically stated that "[n]o amount shall be available for the Fund for purposes of this section after the fifth fiscal year after the date of enactment of this section." *Id.* Also, the bill provided that entities are prohibited from using any part of the loan "for payment of penalties, fines, or administrative costs." *Id.* at S14,717.

118. See *id.* at S14,717.

119. See *id.* at S14,736.

120. See 142 CONG. REC. E16 (daily ed. Jan. 4, 1996) (statement of Rep. Coyne). This bill is now included as Subtitle C of More Power for Empowerment Zones Act of 1996, House Bill 3241, introduced on April 15, 1996 by Representative Foglietta. See 142 CONG. REC. H3386 (April 15, 1996).

121. See *id.* Representative Coyne stressed that the cleanup and revitalization of old, abandoned industrial sites has been a central issue for our nation's cities. See *id.* He further noted that these sites present both public health and pollution problems, and serious impediments to the economic well-being of the surrounding areas. See *id.*

122. See *id.* Representative Coyne pointed out that the amelioration of brownfields is contingent on the availability of affordable financing for the imple-

ment bonds would be tax exempt. Thus, the federal government would in effect be subsidizing worthy local redevelopment.¹²³ Second, the bill removed the qualification that the proposed site be at least 100 acres in size.¹²⁴

Making similar efforts for reform, Representative Franks of New Jersey addressed the House on January 31, 1996, suggesting the creation of a brownfields IRA. The IRA would permit tax-free contributions of up to \$5 million for the exclusive use of brownfields remediation.¹²⁵

Supporting the assumption of greater authority by the states in the redevelopment of brownfields, Representative Bliley, a republican from Virginia, proposed House Bill 2500, amendments to the Reform of Superfund Act, which had been sponsored by Representative Oxley of Ohio.¹²⁶ Representative Bliley indicated that the amendments' most significant features were the elimination of the federal permit requirement for brownfields cleanup and the certainty it would provide.¹²⁷ In addition, Representative Bliley proposed that generators and transporters be exempt from liability.

mentation of effective redevelopment programs. *See id.* As a result, his proposed legislation sought to alleviate the financial impediments to these programs. *See id.*

123. *See id.*

124. *See id.* Representative Coyne concluded that "the financial assistance provided in this bill would be a valuable tool in the environmental and economic redevelopment of America." *Id.*

125. *See* 142 CONG. REC. H978 (daily ed. Jan. 31, 1996) (statement of Rep. Franks). Representative Franks emphasized that the bill aimed to bring about new employment opportunities and more revenue to dilapidated areas across the nation. *See id.* At the same time, Representative Franks asserted that the bill did not compromise public health or environmental quality. *See id.*

126. *See Superfund: Amendment to Pending House Superfund Bill Would Set Grants, Loans for 'Brownfields,'* 26 Env't Rep. (BNA) 1882 (Feb. 2, 1996). The major objective of the proposed amendments to the Reform of Superfund Act has been described as "giv[ing] relief to small businesses by carving out certain disposal sites from the liability web and . . . [enabling] states to assume more control over superfund sites." *Id.* In support of these amendments, Representative Bliley stated that "[w]hen it comes to reinvesting in America's industrial core, the one thing everyone wants is certainty Developers, lenders, local governments alike — those willing to redevelop America's industrial sites — need to know, deserve to know, that their efforts won't be second guessed, or impeded by government regulators." *Id.*

127. *See id.* Senator Christopher Bond viewed the redevelopment of brownfields as "one of the best investments we can make." *Id.* At the same time, one commentator noted that:

The future implications for cities is bleak as a result of the strange cycle created by Superfund liability. Though urban industrial property may be less expensive than other development property, the full costs is actually prohibitive. In determining actual costs to a purchaser, both cleanup cost and the cost of potential future liability must be added to the purchase price.

Solo, *supra* note 107, at 302-03.

Representative Bliley did not, however, suggest altering liability for owners and operators.¹²⁸

An increased state role was also supported by the United States Conference of Mayors (Mayors' Conference), which met with President Clinton on January 25, 1996.¹²⁹ The Mayors' Conference, presenting a paper to President Clinton entitled "The Brownfields Redevelopment Action Agenda, Initial Framework," proposed constructing a program of tax incentives, reduced liability for lenders and less onerous regulatory burdens.¹³⁰ The Mayors' Conference recommended tax credits and revolving local funds to reduce the risk of loss of initial investment and to encourage development.¹³¹

While it seems that many of the aforementioned proposals would benefit both the environment and the economy, these proposals have not gained universal support. For example, several democrats in the House of Representatives have urged their republican colleagues, Representatives Bliley and Oxley, to reconsider House Bill 2500, the proposed amendments to the Reform of Superfund Act.¹³² In fact, the democratic "rust belt" representatives, Representative Dingell of Michigan, Representative Gephardt of Missouri and Representative Brown of Ohio, requested republi-

128. See *Superfund: Amendment to Pending House Superfund Bill Would Set Grants, Loans for 'Brownfields,' supra* note 126, at 1882. Representative Bliley explained that while the details of the amendment were still being refined, he does not intend to pay polluters. See *id.* Rather, his liability scheme aimed at reducing the cost of complex litigation. See *id.* Representative Bliley stated that his proposal "takes that \$7 billion 'out of the courtroom, and puts it out there at the 1,300 toxic waste sites,' where it belongs." *Id.*

129. See *Hazardous Waste: Mayors Release Proposal on Brownfields; President Urges Support for Tax Incentives*, 26 Env't Rep. (BNA) 1871 (Feb. 2, 1996). Specifically, the United States Conference of Mayors (Mayors' Conference) released a five-point paper requesting both President Clinton and Congress to develop a brownfields program that would include liability protection for lenders, innocent third-party purchasers, and redevelopers of brownfields. See *id.* The Mayors' Conference also supported a targeted remediation tax credit program. See *id.*

130. See *id.* At the conference President Clinton stated that "[w]e want to help communities to clean up old waste sites by giving tax incentives to those who will buy and clean them up . . ." *Id.* Expressing his concern regarding regulatory burdens, the President concluded that "I believe we can get broad bipartisan support for the brownfields initiative." *Id.*

131. See *id.* One analyst, recognizing the connection between environmental laws and economics, commented that "Superfund has had an impact on industry and economics, because it has affected decisions of business owners, developers, lenders, insurers, and urban populations." Solo, *supra* note 107, at 303.

132. See *Superfund: House Democrats Urge GOP to Separate Brownfields Provision from CERCLA Bill*, 26 Env't Rep. (BNA) 2001 (Feb. 16, 1996). The democrats argued that "a separate bill would expedite assistance to areas affected by these abandoned industrial sites." *Id.* However, the republicans responded that "superfund reform legislation cannot proceed without a brownfields title because it is an integral part of superfund reform." *Id.*

can Representative Bliley of Virginia to advance a bipartisan brownfields bill separate from the Reform of Superfund Act. These democratic congressmen have made known their lack of confidence in the future of Superfund.¹³³ Integrating brownfields reform into a bill with an arguably less than promising future could sound the death knell for brownfields redevelopment initiatives.¹³⁴ This situation exemplifies the hindrances caused by the political agenda advanced by legislators, despite the common goals of economic revitalization and redevelopment of industrial property.

Unfortunately, the opposing viewpoints of republicans and democrats appear to be at an impasse. Illustrating the reasons for the deadlock, one republican staff member in the House of Representatives compared the republican sponsored bill, House Bill 2500, with the democratic sponsored bill, House Bill 2178, and argued that the republican sponsored bill was more consistent with the recommendations supported by the United States Conference of Mayors.¹³⁵ According to this staff member, the republican sponsored bill addressed five of the points included in the paper produced by the Mayors' Conference, while House Bill 2178 addressed only two.¹³⁶ In closing, the staff member commented on the lack of support from House democrats in drafting House Bill 2500, and stated "we're going to move [House Bill] 2500, and these guys had better get used to it."¹³⁷

133. *See id.* The House democrats noted the expiration of corporate and excise taxes from which Superfund derives its funding, casts a looming shadow of doubt over the future vitality of CERCLA. *See id.*

134. *See id.*

135. *See id.* These House democrats noted the parallel funding notions and levels of Representative Bliley's proposed amendments and House Bill 2178, a bill introduced by House democrats. *See id.* Expressing their disapproval of Representative Bliley's proposal, the democrats commented that "there is little or no chance of the House acting quickly to pass a broad superfund bill that can win approval in the Senate and be sent to the president to be signed into law." *Id.*

136. *See id.* Whether from the democrats or from the republicans, the need for change and amendment exists. *See Solo supra* note 107, at 305-07 (explaining that CERCLA was not designed to dissuade buyers from creating "environmentally sound development").

137. *See Superfund: House Democrats Urge GOP to Separate Brownfields Provision from CERCLA Bill, supra* note 132, at 2001. Regardless of which political party suggests change, solutions and proposals must be scrutinized as follows:

Proposed solutions and strategies for cleanup and redevelopment of brownfields must be evaluated with respect to the original purposes of Superfund legislation: to protect public health and environment and to invoke strict, joint, and several liability on the parties "responsible" for contaminating our land and water

See Solo, supra note 107, at 307.

At the same time, some congressmen have not allowed political parties to hinder their efforts for reform. On February 26, 1996, members of the New Jersey Congressional Delegation, including Senator Frank Lautenberg and Representative Donald Payne, both democrats from New Jersey, urged bipartisan support of EPA's brownfields' initiative. Without specifically mentioning House Bill 2500 or any other bill, Senator Lautenberg criticized legislation which would reduce liability of "corporate polluters."¹³⁸ Representative Payne agreed with Senator Lautenberg, articulating the polar perceptions of some elected officials and environmentalists.¹³⁹ Interestingly enough, Representative Payne also expressed approval of House Bill 2919, which was sponsored in part by Representative Franks, a republican from New Jersey. The bill proposed releasing lenders, developers, local governments and purchasers from lender liability and creating a "brownfields IRA."¹⁴⁰

Despite Representative Payne's democratic approval of Representative Frank's republican initiative, discord has continued. Political and ideological conflict was expressed in an exchange of correspondence from February 14 - 16, 1996, between ranking House Commerce Committee member democratic Representative Dingell and the Committee Chair, republican Representative Bliley.¹⁴¹ Receiving support from democratic Representatives Gephardt and Brown, Representative Dingell proposed that the brownfields issue receive immediate attention by way of stand-alone legislation, rather than awaiting the overhaul of CERCLA pursuant to House Bill 2500. Representative Bliley criticized this suggestion

138. See *Superfund: Initiative on Brownfields Redevelopment Backed by Members of New Jersey Delegation*, 26 Env't Rep. (BNA) 2070 (Mar. 1, 1996). In practice, releasing corporate polluters from liability is very common among state voluntary cleanup programs under which the developing party receives a reduction in liability if it proceeds with redevelopment of a contaminated piece of land. See Solo, *supra* note 107, at 311 n.146.

139. See *Superfund: Initiative on Brownfields Redevelopment Backed by Members of New Jersey Delegation*, *supra* note 138, at 2070. Representative Payne, a democrat from New Jersey, stated "I believe that many of our nation's elected officials lack vision . . . [and consequently] . . . [m]any mistakenly claim that environmentalists choke the life out of industry and business." *Id.* Payne concluded that "[u]nfortunately some lenders place corporate profit above public health and safety." *Id.*

140. See *id.*

141. See *Superfund: House Lenders Support Bipartisan Effort on Brownfields, Other CERCLA Reform Issues*, *supra* note 4, at 2036. At the Mayors' Conference, President Tom Rice noted that "[w]e're here to tell Washington that bickering and blaming is not playing well on Main Street Government shutdowns and stop-gap, underfunded continuing resolutions are unacceptable. They have caused great harm in local communities and damaged public confidence in America's future." *Mayors Tell Feds: Get Your Act Together*, NATION'S CITIES WEEKLY, Jan. 29, 1996, at n.1.

as "advocating a piecemeal approach" to reform which would be ineffective in reforming the Superfund program and reducing litigation.¹⁴² Still, both Representatives indicated a willingness to pursue bipartisan support for reform.¹⁴³

Not surprisingly, Representative Rick White, a republican from Washington, noted that the lack of consensus among members of the Commerce Committee was a major obstacle in enacting House Bill 2500.¹⁴⁴ Additionally, issues concerning releasing generators and transporters from retroactive liability, funding through grants and zero-interest loans to local governments, and the expediency of cleanup created obstacles for the bill's passage.¹⁴⁵ President Clinton has criticized the position generally articulated by republicans regarding these issues. In response, Representative Bliley argued that the delays caused by bureaucratic and litigation costs frustrate cleanup efforts. He also indicated that the average resulting delay in remediation of a site is at least twelve years.¹⁴⁶

Thus, although the majority of federal actors have recognized the benefits of economic revitalization and remediation of contaminated property, and have proposed similar methods of achieving those goals, a cohesive program for brownfields redevelopment seems elusive. However, on March 11, 1996, President Clinton articulated some signs of compromise when he spoke at Fairleigh Dickinson University and announced his administration's program to restore brownfields.¹⁴⁷ The proposed plan includes a \$2 billion, seven year tax incentive to encourage private investment and redevelopment of 30,000 sites in areas with a minimum poverty level of twenty percent.¹⁴⁸ The plan also provides that lenders and subse-

142. See *Superfund: House Lenders Support Bipartisan Effort on Brownfields, Other CERCLA Reform Issues*, *supra* note 4, at 2037.

143. See *id.*

144. See *Superfund: Meetings Continue on GOP Reform Bill; Little Progress Seen on Disputed Issues*, *supra* note 5, at 2069.

145. See *id.* Representative Bliley challenged his opponents to create their own plans since they are unsatisfied with his plan, but noted that "Bill Clinton talks about the 10 million American children under the age of 12 who live within four miles of a toxic waste site, but at the current snail's pace of superfund cleanup, those children will be in their mid-20s before those sites are even cleaned up." *Id.*

146. See *id.*

147. See *Superfund: Clinton Unveils Tax Incentive Plan to Restore 30,000 'Brown-field' Sites*, 26 Env't Rep. (BNA) 2140 (Mar. 15, 1996) (noting that President's program is designed to build on BERI by revitalizing communities that are currently overburdened with abandoned industrial sites).

148. See *id.* President Clinton stated that the minimum poverty level of 20% was implemented "to make it possible for brownfields investors to deduct their cleanup expenses immediately and cut the costs for this type of investment in half" *Id.* at 2140-41.

quent purchasers "inheriting" contaminated property not be held liable.¹⁴⁹ The program is intended to supplement EPA's initiative and provides that cleanup expenses be fully deducted in the year they are spent. The end result is a net tax subsidy by the United States Treasury for seven years.¹⁵⁰ Moreover, not only do sites with the requisite poverty level benefit, but sites under the EPA pilot program also qualify for the tax incentive.¹⁵¹

Despite partisan obstacles and bureaucratic set backs, an increased participation at the state and local levels is a common aspect of the federal proposals. Several states have created voluntary response programs.¹⁵² In addition, several other alternatives have been articulated, including prospective purchaser agreements, status or comfort letters, lease arrangements with purchase options, indemnification agreements and consent decrees.¹⁵³

C. State Action

New Jersey, Ohio and Pennsylvania have all initiated voluntary cleanup programs.¹⁵⁴ Such programs provide security to potential owners by ensuring that EPA will not list them on the NPL. Also, potential owners are assured that cleanup actions will abide by National Contingency Plan requirements.¹⁵⁵ These programs are preferable to mandatory cleanups because they effectively avoid litigation while benefitting the environment as well as the economy.¹⁵⁶ Compliance with a voluntary program may also avoid the declining property values often caused by the stigma of mandatory cleanups.

On July 26, 1995, after New Jersey's voluntary program gained EPA's approval, the City of Trenton received a pilot grant of

149. *See id.* at 2141.

150. *See id.*

151. *See id.* As of March 1996, 40 pilot programs had been implemented by the administration to return existing brownfields to productive use. *See id.*

152. *See Keener, supra* note 52, at 144.

153. *See id.* at 149-50.

154. *See Hazardous Waste: State Voluntary Cleanup Programs Better than Mandatory Cleanups, Speakers Claim*, 26 Env't Rep. (BNA) 497 (June 30, 1995).

155. *See Keener, supra* note 52, at 144.

156. *See Hazardous Waste: State Voluntary Cleanup Programs Better than Mandatory Cleanups, Speakers Claim, supra* note 154, at 497 (stating that "[s]tate voluntary programs for redeveloping abandoned industrial property are cheaper, more flexible, and quicker than mandatory cleanups and result in economic benefits for participating companies and communities"). The benefits of voluntary cleanups include the avoidance of expensive and litigation-filled mandatory cleanups, revitalization of an industrial area, use of existing infrastructure, and the sparing of greenfields or undeveloped property from development. *See id.*

\$200,000 from EPA.¹⁵⁷ New Jersey's statutory scheme, effective as of June 16, 1993, is known as the Industrial Site Recovery Act (ISRA).¹⁵⁸ Spurred by public concern regarding health and environmental risks caused by a legacy of contamination, the New Jersey legislature enacted ISRA to protect public health and welfare and encourage efficient and timely remediation without unnecessary financial burdens.¹⁵⁹

ISRA is designed to streamline the regulatory process by reducing regulatory oversight and establishing summary procedures.¹⁶⁰ The statute specifically excludes the holder of a mortgage or other security interest from liability unless title is secured through foreclosure, court order or other process.¹⁶¹ Also, the statute requires an owner or operator planning to terminate ownership to notify the Department of Environmental Protection (DEP) and remediate the site or provide the DEP with a copy of a valid remediation agreement.¹⁶² Implementation of the proposed remediation plan is sub-

157. See 141 CONG. REC. E1516 (daily ed. July 26, 1995) (statement of Rep. Smith).

158. See N.J. STAT. ANN. § 13:1K-6 (West Supp. 1997). This section provides that "[t]his act shall be known and may be cited as the 'Industrial Site Recovery Act.'" *Id.*

159. See *id.* § 13:1K-7. Specifically, this provision provides:

The legislature finds that discharges of toxic chemicals dating back to early industrialization have left a legacy of contaminated industrial property in this State; that in 1983, due to the growing public awareness and concern of the risks to the public health and the environment and the potential costs to the State to clean up abandoned contaminated sites, the "Environmental Cleanup and Responsibility Act" was enacted.

Id.

160. See *id.* § 13:1K-7. Section 13:1K-7 also provides:

The Legislature therefore declares that it is the policy of this State to protect the public health, safety, and the environment, to promote efficient and timely cleanups, and to eliminate any unnecessary financial burden of remediating contaminated sites; that these policies can be achieved by streamlining the regulatory process, by establishing summary administrative procedures for industrial establishments that have previously undergone an environmental review, and by reducing oversight of these industrial establishments where less extensive regulatory review will ensure the same degree of protection to public health, safety, and the environment; and that the new procedures established to this act shall be designed to guard against redundancy from the regulatory process and to minimize governmental involvement in certain business transactions.

Id.

161. See *id.* § 13:1K-8. Under section 13:1K-8, a change in ownership does not include the "execution, delivery and filing or recording of any mortgage, security interest, collateral assignment or other lien on real or personal property . . ." *Id.*

162. See *id.* § 13:1K-9(a). This section states in pertinent part:

The owner or operator of an industrial establishment planning to close operations or transfer ownership or operations shall notify the department in writing, no more than five days subsequent to closing operations

ject to DEP approval.¹⁶³ An owner, however, is exempted from the remediation requirements if the total quantity of hazardous substances is less than five hundred pounds or fifty-five gallons. If, however, hazardous and nonhazardous substances are mixed, the total quantity of hazardous and nonhazardous substances cannot exceed five hundred pounds or fifty-five gallons in order to meet the requirements of the exemption. Moreover, if the substances consist of hydraulic or lubricating oil, the total quantity of oil cannot exceed two hundred twenty gallons in order to qualify for the exemption.¹⁶⁴

With respect to enforcement, the Act provides for penalties of \$25,000.00 per day for noncompliance.¹⁶⁵ These penalties may be imposed for unapproved transfers or failure to comply with an Ad-

or of its public release of its decision to close operations, whichever occurs first, or within five days after the execution of an agreement to transfer ownership or operations, as applicable. The notice to the department shall: identify the subject industrial establishment; describe the transaction . . . ; state the date of the closing of operations or the date of the public release of the decision to close operations as evidenced by a copy of the appropriate public announcement, if applicable; state the date of the execution of the agreement to transfer ownership or operations and the names, addresses and telephone numbers of the parties to the transfer, if applicable; state the proposed date for closing operations or transferring ownership or operations

Id.

163. See N.J. STAT. ANN. § 13:1K-9.6. The legislature set the following guidelines for reviewing a remediation plan: "Upon submission of the complete and accurate results of a phase of the remediation . . . or of any other document required to be submitted that requires the department's review and approval . . . the department shall review and approve, approve with conditions, or disapprove the submission or other documents" *Id.*

164. See *id.* § 13:1K-9.7. The remediation standard was the subject of discussion on December 15, 1995, when it was recommended that sites be considered "clean" and future liability severed if contaminants are permanently reduced to an increased lifetime cancer risk of one in one hundred thousand. See *New Jersey: More Lenient Risk Management Standards Recommended by Commission for Cleanups*, 26 Env't Rep. (BNA) 1407 (Dec. 15, 1995). While the advocates of this standard argued that it would stimulate remediation, opponents contended that the standard prompts spending more money at the present time, but achieves less in terms of cleanup and does not guarantee remediation of more sites. See *id.*

165. See N.J. STAT. ANN. § 13:1K-13(a)-(b). This section states:

(a) Failure of the transferor to perform a remediation and obtain department approval thereof as required pursuant to the provisions of this act is grounds for voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith by the transferee, entitles the transferee to recover damages from the transferor, and renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all remediation costs and for all direct or indirect damages resulting from the failure to implement the remedial action workplan. A transferee may not act to void the sale or transfer of an industrial establishment or any real property except upon providing notice to the transferor of the failure to perform and affording the trans-

ministrative Consent Order (ACO) or a Memorandum of Agreement (MOA). Unapproved transfers, however, will not be penalized if the transfer occurred prior to the enactment of ISRA and the owner enters into an ACO or MOA in order to achieve compliance in a timely fashion.¹⁶⁶

On January 10, 1996, New Jersey Governor Whitman signed a bill to encourage cleanup by industrial property owners.¹⁶⁷ The bill encourages cleanup by providing a ten year state tax exemption if all remedial work complies with ISRA and the site is returned to commercial or industrial use.¹⁶⁸ Also, municipalities are entitled to loans and tax exemptions for the purpose of remediation of such property.¹⁶⁹

Another "rust belt" state, Pennsylvania, has also provided a statutory response to the brownfields/greenfields dilemma in its Land Recycling and Environmental Remediation Standards Act (LRERS).¹⁷⁰ LRERS defines cleanup liability, establishes a standards scheme and remediation funding, and assigns powers and du-

feror a reasonable amount of time to comply with the provisions of this act.

(b) Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of this act is liable for a penalty of not more than \$25,000.00 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense. Penalties shall be collected in a civil action by a summary proceeding Any officer or management official of an industrial establishment who knowingly directs or authorizes the violation of any provisions of this act shall be personally liable for the penalties established in this subsection.

Id.

166. *See id.* § 13:1K-11.10(a). This section states in relevant part: Any person who . . . violated the [law] by closing operations or transferring ownership or operations of an industrial establishment without receiving departmental approval of a cleanup plan or negative declaration . . . or without entering into an administrative consent order that allows the closure of operations or transfer of ownership or operations, shall not be subject to a penalty for that violation if the person notifies the department of the closure of operations or of the transfer of ownership or operations of the industrial establishment, and . . . enters into an administrative consent order or a memorandum of agreement with the department to complete a remediation of the industrial establishment

Id.

167. *See New Jersey OKs Incentives to Redevelop Brownfields*, 26 Env't Rep. (BNA) 1779 (Jan. 19, 1996).

168. *See id.* The need for additional legislation and financial incentive may be indicative of a weakness in enforcement under ISRA itself. If enforcement through monetary sanctions and administrative orders was sufficiently effective, additional legislation and incentives would not be necessary.

169. *See id.*

170. *See* PA. STAT. ANN. tit. 35, § 6026.101 (West Supp. 1997).

ties to the Environmental Quality Board and the Department of Environmental Resources.¹⁷¹ LRERS also establishes a state treasury fund in order to provide grants and loans. Before providing these grants and loans, however, several factors are to be taken into consideration. Specifically, LRERS dictates that the public benefit served, the permanence of the remedy, the cost effectiveness of the remedy, the financial condition of the applicant, the general geographic area, and the potential for economic development be considered in determining whether to provide a grant or a loan.¹⁷² LRERS also provides that the state treasury fund receive all fines and penalties imposed under the Act.¹⁷³

LRERS operates in conjunction with the Hazardous Sites Cleanup Act¹⁷⁴ and the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act.¹⁷⁵ Provisions of the Hazardous Sites Cleanup Act define certain terms within the statute, including but not limited to disposal, owner or operator, responsible person and transportation.¹⁷⁶ Significantly, "disposal"

171. *See id.*

172. *See id.* § 6026.702(e). This section provides:

(e) Priority for financial assistance.— The Department of Commerce shall take all of the following factors into consideration when determining which applicants shall receive financial assistance under this section:

- (1) The benefit of the remedy to public health, safety, and the environment.
- (2) The permanence of the remedy.
- (3) The cost effectiveness of the remedy in comparison with other alternatives.
- (4) The financial condition of the applicant.
- (5) The financial or economic distress of the area in which the cleanup is being conducted.
- (6) The potential for economic development.

The Department of Commerce shall consult with the department when determining priorities for funding under this section.

Id.

173. *See id.* § 6026.701(c). This section provides in pertinent part:

In addition to any funds appropriated by the General Assembly, Federal funds and private contributions and any fines and penalties assessed under this act shall be deposited into the fund. Moneys in the fund are hereby appropriated, upon the approval of the Governor, for the purposes of this act.

Id.

174. *See id.* § 6020.101.

175. *See* PA. STAT. ANN. tit. 35, § 6027.1 (West Supp. 1997).

176. *See id.* § 6020.103. Transportation is defined as "[t]he conveyance of a hazardous substance or contaminant by any mode, including pipeline." *Id.* For the definitions of "disposal," "owner or operator" and "responsible person," see *infra* notes 177-80.

includes active contamination as well as leaking.¹⁷⁷ "Owner or operator" does not include one who holds indicia of ownership primarily to protect a security interest, or a financial institution which acquires a site by foreclosure or enforcement of a mortgage or security interest before learning that the site was listed on the NPL or corresponding state list and did not manage or control activities at the site which contributed to the release or threat of release.¹⁷⁸ The supervision of finances is excluded from the term "management."¹⁷⁹ "Responsible person" does not include a financial institution merely supervising or otherwise involved with the finances and operations of a responsible person in connection with a loan or obligation.¹⁸⁰

177. See *id.* "Disposal" is defined as "[t]he incarceration, combustion, evaporation, air stripping, deposition, injection, dumping, spilling, leaking, mixing or placing of a hazardous substance or contaminant into the air, water or land in a manner which allows it to enter into the environment." *Id.*

178. See *id.* "Owner or Operator" is defined as:

A person who owns or operates or has owned or operated a site, or otherwise controlled activities at a site. The term does not include a person who, without participating in the management of a site, holds indicia of ownership primarily to protect a security interest in the site nor a unit of State or local government which acquired ownership to control involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The term also shall not include a financial institution, an affiliate of a financial institution, a parent of a financial institution, nor a corporate instrumentality of the Federal Government, which acquired the site by foreclosure or financial institution, parent of such financial institution, affiliate of such financial institution or a corporate instrumentality of the Federal Government before it had knowledge that the site was included on the National Priority List or corresponding State list and did not manage or control activities at the site which contributed to the release or threatened release of a hazardous substances.

Id.

179. See *id.* The definition of "[o]wner or operator" further provides that: For the purposes of this subsection, the term "management" shall not include participation in or supervising the finances or fiscal operations of a responsible person or an owner or operator in connection with a loan to, services provided for or fiscal obligations of that responsible person or owner or operator or actions taken to protect or preserve the value of the site or operations conducted on the site. This exclusion does not apply to a political subdivision which has caused or contributed to the release or threatened release of a hazardous substance from the site.

Id.

180. See PA. STAT. ANN. tit. 35, § 6020.103 (West Supp. 1997). The term "responsible person" is defined as follows:

A person responsible for the release of a hazardous substance as described in section 701. In no case shall a financial institution or its affiliate or a corporate instrumentality of the Federal Government be deemed to be a responsible person or to be jointly or contingently liable for the actions of a responsible person by virtue of supervision of, or involvement

Section 701 of the Hazardous Sites Cleanup Act provides that, as a general rule, a person is responsible for a release or threat of release of a hazardous substance if that person is an owner, operator, generator or transporter.¹⁸¹ The statute also contains exceptions to liability, including an exception for subsequent purchasers. The subsequent purchaser exception, however, may be used only if six criteria are met.¹⁸² Specifically, an owner of such property must

with, the finances and operations of a responsible person in connection with a loan, obligation, or other service provided.

Id.

181. *See id.* § 6020.701(a).

(a) General rule— Except for releases of hazardous substances expressly and specifically approved under a valid Federal or State permit, a person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply:

(1) The person owns or operates the site:

(i) when a hazardous substance is placed or comes to be located in or on a site;

(ii) when a hazardous substance is located in or on the site, but before it is released; or

(iii) during the time of the release or threatened release.

(2) The person generates, owns or possesses a hazardous substance and arranges by contract, agreement, or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.

(3) The person accepts hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs.

Id.

182. *See id.* § 6020.701(b)(1). This section provides in relevant part:

(1) An owner of real property is not responsible for a release or threatened release of a hazardous substance from a site in or on the property when the owner demonstrates to the department that all of the following are true:

(i) The real property on which the site concerned is located was acquired by the owner after the disposal or placement of a hazardous substance on, in or at the site.

(ii) The owner has exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances.

(iii) The owner took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions.

(iv) The owner obtained actual knowledge of the release or threatened release of a hazardous substance at the site when the owner owned the real property, and the owner did not subsequently transfer ownership of the property to another person without disclosing such knowledge.

establish that the property was acquired after disposal, that the owner exercised due care and the owner took precautions against foreseeable acts or omissions of any third party.¹⁸³ The owner must also demonstrate that the property was not then transferred by the owner without disclosing knowledge of any actual or potential release, that the owner has not caused or contributed to the release or threatened release, and that the only basis of liability is ownership of the land.¹⁸⁴ Section 701 also includes an innocent purchaser exception.¹⁸⁵

The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act provides a definition of "indicia of ownership." This definition refers to both legal and equitable interests, acquired directly or indirectly, and includes mortgages, deeds of trust and financing transactions in which the lessor does not control daily operation or maintenance.¹⁸⁶ How-

(v) The owner has not, by act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the response action relating to the site.

(vi) The owner meets one of these requirements:

(A) At the time the owner acquired the site, the owner did not know, and had no reason to know, that a hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the site.

....

(B) The owner is a government entity which acquired the site by escheat, through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

(C) The owner acquired the site by inheritance or bequest.

(D) The owner is a financial institution or an affiliate of a financial institution or a corporate instrumentality of the Federal Government which acquired the site by foreclosure or by acceptance of a deed in lieu of foreclosure.

Id.

183. *See id.*

184. *See id.*

185. *See* PA. STAT. ANN. tit 35, § 6020.701(b)(2).

186. *See id.* § 6027.3. "Indicia of ownership" is defined as follows:

Any legal or equitable interest in property acquired directly or indirectly:

(1) for securing payment of a loan or indebtedness, a right of reimbursement or subrogation under a guaranty or the performance of another obligation;

(2) evidencing ownership under a lease financing transaction where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property; or

(3) in the course of creating, protecting, or enforcing a security interest or right of reimbursement of subrogation under a guaranty.

ever, those with the above described “indicia of ownership” are specifically excluded as responsible parties in the Hazardous Sites Cleanup Act.¹⁸⁷

Ohio has enacted Senate Bill 221, a voluntary remediation statute, in an effort to effectively address the brownfields problem.¹⁸⁸ Generally, the law limits liability for lenders and those voluntarily undertaking remediation, attempts to clarify some ambiguities under CERCLA, and provides a remediation standard.¹⁸⁹ The Act provides two phases of remediation which a person undertaking remediation may select.¹⁹⁰ Nevertheless, both phases may not be available for selection, depending upon the severity of contamination. In addition, a party who chooses to conduct cleanup activities may seek a covenant not to sue from the state.¹⁹¹ There are two

The term includes evidence of interest in mortgages, deeds of trust, liens, surety bonds, guaranties, lease financing transactions where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property, other forms of encumbrances against property recognized under applicable law as vesting the holder of the security interest with some indicia of title.

Id.

187. *See id.* § 6020.103. For a definition of the term “responsible person” as used in the Hazardous Sites Cleanup Act, see *supra* note 180.

188. *See* OHIO REV. CODE ANN. § 3746.04 (Anderson 1997).

189. *See id.* § 3746.04(B)(1). This section provides that the director of environmental protection may adopt rules that establish the following:

Appropriate generic numerical clean-up standards for the treatment or removal of soils, sediments, and water media for hazardous substances and petroleum. The rules shall establish separate generic numerical clean-up standards based upon the intended use of properties after the completion of voluntary actions, including industrial, commercial, and residential uses and such other categories of land use as the director considers to be appropriate. The generic numerical clean-up standards established for each category of land use shall be the concentration of each contaminant that may be present on a property that shall ensure protection of public health and safety and the environment for the reasonable exposure for that category of land use.

Id.

190. *See id.* § 3746.10(A). This section provides in relevant part: Except as otherwise provided in section 3746.02 of the Revised Code, any person may undertake a voluntary action under this chapter and rules adopted under it to identify and address potential sources of contamination by hazardous substances of soil, sediments, surface water, or ground water on or underlying property and to establish that the property meets applicable standards.

Id.

191. *See id.* § 3746.12(A). This section provides in pertinent part: Except as otherwise in division (C) of this section, the director of environmental protection shall issue to a person on behalf of whom a certified professional has submitted to the director an original no further action letter and accompanying verification under division (A) of section 3746.11 of the Revenue Code a covenant not to sue for the property that is named in the letter. The director shall issue a covenant not to sue if an

noteworthy aspects of the covenant not to sue. First, the covenant's effectiveness is contingent upon compliance with state standards. Second, the covenant does not absolve parties from liability under federal statutes.¹⁹²

The Ohio statute also provides a security interest exemption. Although it mirrors the CERCLA exemption, the Ohio exemption modifies the definitions of participation in management, indicia of ownership primarily to protect a security interest, and owner or operator.¹⁹³ Similar to the New Jersey and Pennsylvania statutes, Ohio also has established funds from which loans are granted to finance private remediation.¹⁹⁴ Finally, the Ohio statute permits legislative authorities to grant relief from property tax increases that result from remediation in the form of tax abatements.¹⁹⁵

original no further action letter is submitted to him by any person other than the certified professional who prepared the letter or if a copy of the letter is submitted to him.

Id.

192. *See id.* § 3746.12(A)(1).

193. *See* OHIO REV. CODE ANN. § 3746.26(A)(1). This section provides in relevant part:

Any person who, without participating in the management of a property, holds indicia of ownership in a property primarily to protect a security interest in the property is not liable for:

(a) The costs of conducting a voluntary action in a civil action brought under section 3746.23 of the Revised Code or otherwise brought under the Revised Code or common law of this state in connection with a voluntary action undertaken at a property in which the person holds indicia of ownership for that purpose.

Id.

194. *See, e.g., id.* § 6123.041. This section provides:

(A) With respect to projects, and the financing thereof, for industry, commerce, distribution, or research . . . the Ohio water development authority . . . may do any or all of the following:

(1) Make loans for the acquisition or construction of the project to the person upon such terms as the authority may determine or authorize

Id.

195. *See id.* § 5709.88(D). This section provides in pertinent part:

Upon receipt and investigation of a proposal under division (C) of this section, if the legislative authority finds that the enterprise submitting the proposal is qualified by financial responsibility and business experience to create and preserve the employment opportunities at the project site and improve the economic climate of the county or municipal corporation, the legislative authority, after complying with section 5709.83 of the Revised Code, may enter into, and formally shall approve, an agreement with the enterprise under which the enterprise agrees to remediate a facility and to send an amount equal to at least two hundred fifty per cent of the true value in money of the land, buildings, improvements, structures, and fixtures constituting the facility, as determined for purposes of property taxation immediately prior to formal approval of the agreement.

Id.

D. Alternatives

In addition to statutory schemes and individual agreements with EPA, PRPs may pursue other flexible, specifically tailored options. For example, PRPs may use an arrangement whereby the purchaser maintains a tenancy on the property and exercises a purchase option following cleanup.¹⁹⁶ In addition, the traditional tool of indemnification may be utilized if the seller proves to be financially viable.¹⁹⁷ Finally, prospective purchasers may want to consider a forwarding payment in order to defray cleanup costs pursuant to a consent decree entered in federal court and to secure a covenant not to be sued while remediation continues.¹⁹⁸

VI. CONCLUSION

The fight to save brownfields and preserve greenfields, whether for the sake of conservation, economic revitalization or both, faces formidable opposition from inconsistencies in the interpretation of CERCLA. While these inconsistencies create confusion, the most effective response to the brownfields dilemma is characterized by creativity and flexibility. CERCLA's inconsistency and ambiguity must be addressed by statutory reform that works harmoniously with state schemes.

Generally, partisan conflict concerning the method to encourage redevelopment has arisen, and consequently, the ultimate goal of preventing migration to greenfields has not been achieved. Although the republican sponsored proposal to amend CERCLA contained well considered provisions, the extensive legislative delay may result in a solution that is obsolete at the time of its enactment. Thus, the less comprehensive democrat sponsored proposal, though criticized as fragmented, may be more effective in achieving revitalization since it may also be possible to encourage compromise by addressing partisan concerns individually instead of fostering disputes concerning a single comprehensive bill.

Although oversight and enforcement are most effective at the state level, a federal umbrella is imperative to ensure predictability and certainty regarding liability, regulation and expense. A federal umbrella also guarantees a uniform national response to a nationally pervasive problem. At the same time, cleanup activities will not

196. See Keener, *supra* note 52, at 150.

197. See Madore & Breggin, *supra* note 62, at 69 (noting that indemnification agreements are allowed by CERCLA but recognizing that such agreements cannot be used to transfer liability from one person to another).

198. See Keener, *supra* note 52, at 150.

be halted entirely as legislators attempt to reconcile political agendas and courts will not be faced with insurmountable volumes of litigation.

Industrial redevelopment may also be addressed by supplementing statutory schemes with creative alternatives to attract investors to prior commercial areas while achieving remediation. Some alternatives already explored include covenants not to sue, prospective purchaser agreements, status letters, indemnification agreements, tenancy arrangements with future purchase options and consent decrees. These alternatives provide both flexibility, absent from current statutes, and remediation. Admittedly, current state statutes, federal statutes and other options do not utilize the broad brush approach sought by some, and do not provide the flexibility or accommodation sought by others. Therefore, neither revitalization nor remediation will be achieved as quickly as possible. However, one objective should not be forsaken for another.

The current political climate seems to dictate that more rigid statutory provisions would be most effective overall, given the conservative eye cast upon the remediation and investment dilemmas by the courts and legislature. This stringent framework could then be counter-balanced by creative and acceptable supplementary provisions. Finally, state and federal funding, along with tax incentives and noncompliance penalties, can provide incentive for investment. Overall, a balanced approach of rigid statutory provisions and flexible alternative arrangements may allow industrial redevelopment and economic revitalization to be achieved simultaneously.